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In The

Supreme Court of the United States

October Term, 1992

SANDY RIVER NURSING CARE CENTER, *et al.*,

Petitioners,

v.

AETNA CASUALTY AND SURETY COMPANY, *et al.*,

Respondents.

Petition For A Writ of *Certiorari*
To The United States Court Of Appeals
For The First Circuit

BRIEF OF THE STATE OF MAINE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI*

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STATEMENT OF INTEREST

The State of Maine (the "State") submits this brief by its Attorney General as *amicus curiae*, pursuant to Supreme Court Rule 37.5, in support of the pending petition for *certiorari*. In the State's view, the decision of the Court of Appeals below misconstrued and misapplied antitrust law as laid down by this Court in *Federal Trade Commission v. Ticor Title Insurance Company*, 112 S.Ct. 2169 (1992).

Specifically, the Court of Appeals erroneously concluded that a private agreement by workers' compensation insurance carriers not to discount from a jointly filed maximum rate approved by the ratesetting agency fell within the "state action immunity" conferred by *Parker v. Brown*, 317 U.S. 341 (1943), despite the fact that the alleged agreement actually *contravened*[1] clearly articulated state policy, and despite the additional fact that nothing in the record suggests that the alleged agreement was reviewed, authorized or supervised by the ratesetting agency in any fashion. The decision below is thus in open conflict with this Court's recent explanation of the principles of state action immunity in *Ticor*. Indeed, the Court of Appeals completely failed to consider the impact of *Ticor*.

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[1] The statute provides: "Nothing in this chapter is intended to prohibit or discourage reasonable competition, or to prohibit or encourage except to the extent necessary . . . uniformity in insurance rates." Me.Rev.Stat.Ann. title 24-A, §2301 (1988), Appendix ("App.") 91. The statute further explicitly permits discounting from the maximum set by the agency, Me.Rev.Stat.Ann. title 24-A, §2362 (1988), App. 80.

For these reasons, the State believes that this case is appropriate for plenary review. In the alternative, the Court could consider a summary reversal of the decision below, with a remand for reconsideration in light of *Ticor*. In our view, if the decision below goes uncorrected, it will frustrate clear state policy favoring competition, with the result that higher workers' compensation insurance rates will be passed on to Maine consumers. In addition, the decision will promote uncertainty in the law, encourage unnecessary litigation, hamper the State's antitrust enforcement program and impede the State's ability to select and design effective regulatory programs.

The State, through its Attorney General, is charged with enforcement of Maine's "mini-Sherman Act", Me.Rev.Stat.Ann. title 10, §1101 (1980), which, like its federal counterpart, bars contracts or combinations in restraint of trade, including price-fixing agreements. The resources which the State is able to devote to antitrust enforcement are quite limited. In the context of its enforcement program, the State regularly encounters claims of state action immunity under *Parker v. Brown*. The State is concerned that the Court of Appeals' decision in this case will promote uncertainty in the law and thereby encourage unnecessary litigation, with negative consequences for the State's antitrust enforcement program.

In addition, the expansive reading of state action immunity which characterizes the Court of Appeals' decision in this case raises precisely the same federalism concerns argued by the *amici* states in *Ticor*. This Court concluded that those concerns were well-founded, recognizing that "[i]f the States must act in the shadow of

state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it". *Ticor*, 112 S.Ct. at 2178.

The State's purpose as *amicus curiae*, therefore, is to urge this Court to act on the pending petition so as to permit the errors we perceive in the Court of Appeals' opinion to be duly and timely corrected, whether by this Court, or by the Court of Appeals itself upon summary remand.

SUMMARY OF ARGUMENT

The Maine workers' compensation statute provides for collective applications by insurance carriers, pursuant to which the ratesetting agency establishes maximum rates only. The statute explicitly permits carriers to discount from the maximum rates set. For purposes of their summary judgment motion, defendants have admitted their private agreement to maintain and not discount or deviate from prices at the maximum set by the agency, as alleged by plaintiffs. Affirming the District Court's grant of summary judgment on state action immunity grounds, the Court of Appeals held that the statute "must be construed as implicitly condoning" the alleged private agreement, and found that both prongs of the *Midcal* test had been satisfied.

Specifically, the Court of Appeals found that the requirement of an explicit state policy favoring the anti-competitive conduct was satisfied by the statutory scheme permitting joint applications for maximum rates, even though nothing in the statute suggests the existence

of a state policy favoring private agreements not to deviate or discount from prices at the approved maximum. Indeed, the statute contains a clear statement that state policy favors competition whenever possible in the interstices of the regulatory structure. Further, the Court of Appeals found that the ratesetting agency's action in setting maximum rates was tantamount to active supervision of the alleged private agreement not to deviate or discount from the approved maximum, even though nothing in the record indicates the agency was ever made aware of the private agreement.

In reaching these conclusions, the Court of Appeals completely ignored this Court's recent explanation of the principles of state action immunity in *Ticor*. More importantly, the result is completely incompatible with *Ticor*'s substantive holding, and in particular, with this Court's insistence on "real compliance" with both prongs of the *Midcal* test. Rather, the decision below expands the parameters of the state action immunity well beyond the principles of *Ticor*.

Unless it is corrected, the Court of Appeals' decision will have far-reaching and undesirable effects. It will promote uncertainty in the law, give rise to unnecessary litigation and hamper the State's antitrust enforcement program. It will affect the scope and design of state regulatory structures, constricting the field of choices open to their legislative architects. Ultimately, it does violence to the delicate federal balance which this Court was at pains to protect in *Ticor*.

Accordingly, this Court should grant plenary review or, in the alternative, summarily remand for reconsideration in light of *Ticor*.

ARGUMENT

I. INTRODUCTION.

In their Amended Complaint, the plaintiffs in this case alleged that the defendant workers' compensation insurance carriers organized a concerted economic boycott designed to coerce the Legislature into passing legislation which would permit defendants to collectively apply to the competent ratesetting authority for substantial increases in the maximum rates they were permitted to charge. Legislation authorizing joint applications for maximum rates was, in fact, passed by the Legislature in 1987. While allowing joint applications, the statutory scheme did not require insurance carriers to maintain and charge the maximum rates approved by the agency.[2] Rather, the legislation explicitly permitted individual carriers to discount from maximum rates upon filing with the ratesetting agency within 5 days after commencing use of the discounted rate. Me.Rev.Stat.Ann. title 24-A, §2362 (1988), App. 80. Moreover, the 1987 legislation left

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[2] The 1987 legislation reinstated collective applications by repealing provisions enacted in 1985 which excepted worker's compensation from the then otherwise generally applicable rule permitting joint insurance ratemaking. *See Sandy River Nursing Care v. Aetna Casualty*, 985 F.2d 1138, 1146 fn.9 (1st Cir. 1993), App. 19 fn.9.

in place the State's clear policy choice to favor competition as far as possible consistent with the regulatory scheme.[3]

Beyond their allegation of a boycott to coerce legislative action, plaintiffs further alleged that defendants entered a private agreement to maintain, and not deviate or discount from the maximum rates set by the competent ratesetting authority in response to their joint application, after passage of the legislation they sought. Amended Complaint, ¶41(b), App. 42, 61-62; *and see Sandy River*, 985 F.2d at 1141, 1144, App. 7, 14. For purposes of the record on defendants' summary judgment motion (decided in their favor by the District Court and affirmed by the Court of Appeals) defendants apparently admitted to the features of the conspiracy described in the Complaint, including the alleged private agreement not to discount from the maximum rates allowed.[4]

The allegation that defendants had violated antitrust law by their private agreement not to deviate or discount from the allowable maximum rate was not the primary focus of plaintiffs' arguments to the District Court. Nevertheless, that allegation was properly before the District

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[3] Me.Rev.Stat.Ann. title 24-A, §2301 (1988), App. 91, quoted in fn.1 above.

[4] *See Sandy River Nursing Care Center v. National Council on Compensation Insurance*, 798 F.Supp. 810, 814 fn.3 (D.Me.1992) ("[f]or purposes of this summary judgment motion . . . defendants have admitted that they conspired"), App. 29. There is nothing in the record by way of affidavit to call in question the existence of the alleged private agreement.

Court on defendants' motion. The court disposed of the allegation in the following terms:

> The 1987 legislation indisputably created a regulatory regime in which *uniform rates were required or authorized*. . . . "[T]he details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties" which the state rubberstamped or failed to evaluate.

Sandy River, 790 F.Supp. at 816, App. 34-35 (quoting *Ticor*, 112 S.Ct. at 2177) (emphasis added).

Contrary to the District Court's statement, however, the 1987 legislation did *not* require uniform rates; rather, it permitted (but did not require) a collective filing to propose a ceiling on rates from which downward deviation was not only possible, but was encouraged as a matter of policy. Nor were the details of the rates or prices in issue "established as a product of deliberate state intervention". Rather, the 1987 legislation called for the ratesetting agency to establish maximum rates only; moreover, plaintiffs had alleged (and for purposes of their motion, defendants had admitted) a *private* agreement to maintain prices at the maximum, *i.e.*, not to deviate downward from the approved maximum. There was nothing in the record to suggest that the ratesetting agency was even aware of this agreement.

The Court of Appeals nevertheless affirmed, holding: (1) that because it provided for joint applications for maximum rates, the 1987 legislation "must be construed as implicitly condoning an agreement among insurers to charge the rates they jointly propose"; (2) that the 1987 legislation constituted an affirmative expression of a

clearly articulated state policy favoring private agreements not to deviate or discount from the maximum rates allowed by the ratesetting agency; and (3) that the ratesetting agency's action in setting maximum rates constituted active supervision of the alleged private agreement. *Sandy River*, 985 F.2d at 1146-1147, App. 19-21. The court accordingly found defendants immune from antitrust liability on the ground that they had satisfied both doctrinal requirements of state action immunity identified by this Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (articulation of a clear and affirmative state policy; active state supervision of the anticompetitive conduct).

In so holding, the Court of Appeals compounded the District Court's error, and placed itself in direct conflict with *Ticor*, which had been handed down by this Court only seven months before.

II. THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDING IN *TICOR*.

As most recently formulated by this Court in *Ticor*, state action immunity can be grounded on a state law or regulatory scheme only if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *Ticor*, 112 S.Ct. at 2175. The Court emphasized

> the close relation of *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy.

Ticor, 112 S.Ct. at 2178. The Court made clear that "state-action immunity is disfavored", and will not attach without "real compliance with both parts of the *Midcal* test". *Id.* Thus to confer immunity is appropriate only if that result accords with the State's ascertainable intent; and only real compliance with both of *Midcal*'s prongs can provide the necessary assurance that the State, in fact, has chosen to displace the free market with regulation. In its decision below, the Court of Appeals failed to insist on real compliance with either prong, and placed itself in direct conflict with the substantive holding of *Ticor*.

A. The Court Of Appeals Erred In Ruling That A State's "Implicit Condonation" Of Anticompetitive Conduct Is Equivalent To Explicit State Policy Favoring Such Conduct.

While inexplicably failing to mention *Ticor*, the Court of Appeals, in ruling that defendants had satisfied *Midcal*'s first prong, placed heavy reliance on a 1985 case in which this Court held that "a state policy that expressly *permits*, but does not compel, anticompetitive conduct may be 'clearly articulated' within the meaning of *Midcal*." *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 61 (1985) (emphasis in original); *see Sandy River*, 985 F.2d at 1146-1147, App. 20-21. However, the Court of Appeals disregarded an important distinction between *Southern Motor Carriers* and the case at bar.

In *Southern Motor Carriers*, this Court immunized the agreement of motor carriers to publicly file joint ratemaking applications under four state statutory schemes, those of Georgia, Mississippi, North Carolina and Tennessee.

Three of these statutes (those of Georgia, North Carolina and Tennessee) explicitly permitted (though they did not compel) the immunized conduct; the fourth statute (Mississippi's) made clear the state's intent to establish a regulatory program which would completely displace competition. 471 U.S. at 65-66, 65 fn.25. Here, in contrast, defendants seek immunity for a private agreement not to deviate or discount from prices at the maximum rate set by the competent agency. That activity finds no express sanction in any statute of the State of Maine; nor can it be said that a statute which, like Maine's, permits the setting only of *maximum* rates, is clearly intended to completely displace competition.

The Court of Appeals attempted to gloss over this distinction by opining that, although the relevant statute did not expressly permit the alleged private agreement, "it must be construed as implicitly condoning" such an agreement. *Sandy River*, 985 F.2d at 1146, App. 19. There are, however, three problems with this approach. First, the proposition that a statute which permits a joint filing by competitors seeking new maximum rates somehow, without more, authorizes a private agreement not to deviate or discount from the maximum rate set by the competent agency, is a logical *non sequitur*. Second, the statute in issue here instructs that "[n]othing in this chapter is intended to prohibit or discourage reasonable competition", a provision which surely is diametrically at variance with the Court of Appeals' theory of implicit condonation. Me.Rev.Stat.Ann. title 24-A, §2301 (1988), App. 91.

Finally, it is quite impossible to conceive how implicit condonation can in any event satisfy the insistence of

Ticor on real compliance with the requirement that the challenged restraint be one clearly articulated and affirmatively expressed as state policy. *Ticor*, 112 S.Ct. at 2176, 2178; *and see Southern Motor Carriers*, 471 U.S. at 57, quoting *Midcal*, 445 U.S. at 105 and *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion). In fact, Maine has never articulated, expressed or even vaguely intimated a state policy favoring private agreements, outside the regulatory process, not to deviate or discount from the maximum workers' compensation insurance rates allowed by the responsible agency. To the contrary, Maine has clearly indicated that, in the interstices of its workers' compensation ratesetting regulatory framework, competition remains the rule.[5] The Court of Appeals' determination that implicit condonation equates to explicit state policy thus represents a wide and disquieting departure from the law laid down by this Court in *Ticor*.

B. The Court Of Appeals Erred In Finding Active Supervision Of An Alleged Private Agreement Of Which The Ratesetting Agency Was Not Even Aware.

The purpose of *Midcal*'s active supervision prong, as this Court explained in *Ticor*,

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[5] The Maine Attorney General's interpretation of governing state policy as expressed in state statutory law is entitled to some level of deference. *See* R. Langer, *The States Will Continue To Be Central Players In The Development Of Antitrust Policy*, Antitrust Report, May 1993, 3, 4 (if state attorney general takes the position that regulatory framework does not confer immunity from antitrust liability, special deference ought to be accorded) (citing *Ticor*).

> is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. . . . The question is not how well state regulation works, but whether the anticompetitive scheme is the State's own.

Ticor, 112 S.Ct. at 2177. Quoting *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988), this Court emphasized that

> The active supervision requirement stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. . . . The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that . . . actually further state regulatory policies.

Ticor, 112 S.Ct. at 2177. In the present case, the Court of Appeals simply failed to apply this analysis.

Specifically, there is no suggestion on the record of this case that the ratesetting agency was ever aware of, much less approved or in any fashion supervised the alleged private agreement. It is accordingly impossible to logically argue that rates maintained and charged pursuant to the alleged private agreement not to discount were ever "established as a product of deliberate state intervention" or that the anticompetitive scheme was somehow "the State's own". *See Ticor*, 112 S.Ct. at 2177. Despite its illogic, the District Court actually assayed this argument, citing *Ticor*; the Court of Appeals simply

ignored the logical chasm, leaping to the conclusion that "the superintendent's involvement in reviewing and modifying the insurers' proposed [maximum] rates unquestionably meets prong two's requirement of active state supervision". *Sandy River*, 985 F.2d at 1147, App. 21; *and see Sandy River*, 790 F.Supp. at 816, App. 34-35 (quoting *Ticor*, 112 S.Ct. at 2177).

In other words, the Court of Appeals concluded that the ratesetting agency's action in setting maximum rates was tantamount to active supervision of a private agreement among carriers not to deviate or discount from approved maximum rates, an agreement of which the agency was not even aware. This amounts to a grant of immunity by implication – hardly a conclusion which comports with this Court's directive that "state action immunity is disfavored." *Ticor*, 112 S.Ct. at 2178. Further, it is a conclusion which stands in stark opposition to this Court's instruction that "[a]ctual state involvement, not deference to private price fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *Ticor*, 112 S.Ct. at 2176-2177.

III. THE ERROR INTO WHICH THE COURT OF APPEALS HAS FALLEN CARRIES BROAD IMPLICATIONS FOR FUTURE LITIGATION, STATE REGULATION AND THE BALANCE OF FEDERALISM.

Because it unquestionably extends the parameters of the state action immunity well beyond the principles laid down by this Court, the Court of Appeals' decision in this case will sow dragon's teeth of uncertainty, from which a

harvest of litigation, in this Circuit and elsewhere, must one day be reaped. The State of Maine, with limited resources available for antitrust enforcement, does not relish this prospect.

Moreover, the decision can be expected to affect the scope and design of legislation establishing state regulatory schemes. To the extent that it does, it will unnecessarily constrict the field of choices open to the architects of such legislative structures. *See Ticor*, 112 S.Ct. at 2178 (if states must act in the shadow of state action immunity whenever they enter the realm of economic regulation, the doctrine will impede their freedom of action). For ultimately, the Court of Appeals' erroneous decision does violence to the delicate balance of federalism which this Court was at pains to protect in *Ticor*.

CONCLUSION

This Court has emphasized its "insistence on real compliance with both parts of the *Midcal* test". *Ticor*, 112 S.Ct. at 2178. In this case, the Court of Appeals has departed widely from that stricture, and has instead cast "a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement". *Midcal*, 445 U.S. at 106. Because this error carries broad implications, this Court should grant *certiorari* in order to correct it. In

the alternative, the Court should summarily reverse, and remand for reconsideration in light of *Ticor*.

Respectfully submitted,

Dated: June 22, 1993

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